STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

ILLINOIS COMMERCE COMMISSION, on its own motion,	)	Docket No. 01-0662
Investigation concerning Illinois Bell Telephone Company's compliance with Section 271 of the Telecommunications Act of 1996	)	

INITIAL BRIEF

OF THE PEOPLE OF THE STATE OF ILLINOIS

Janice A. Dale
Assistant Attorney General
Chief Public Utilities Bureau
100 West Randolph Street
11th Floor
Chicago, Illinois 60601
(312) 814-3736
Jdale@atg.state.il.us

Susan L. Satter
Senior Assistant Attorney General
Public Utilities Bureau
100 West Randolph Street
11th Floor
Chicago, Illinois 60601
(312) 814-1104
Ssatter@atg.state.il.us

July 24, 2002

TABLE OF CONTENTS

The People of the State of Illinois, by James E. Ryan, Attorney General of the State of Illinois ("the People"), submit the following Initial Brief.

I. INTRODUCTION

For the second time in six years, Ameritech Illinois ("AI") has announced its intention to file an application with the Federal Communications Commission for permission to enter Illinois' long distance market. Consequently, this Commission is once again confronted with the necessity of addressing the many issues which a section 271 filing triggers. Chief among those issues is the role of state law, including state regulatory orders and directives**,** in implementing the market-opening measures needed to create local exchange competition as contemplated by Congress when it passed the Telecommunications Act of 1996. The Attorney General's Office, as a matter of law and policy, wholeheartedly supports the promotion of competition in both the local and long-distance markets.

Although there have been some changes to the competitive landscape since AI's last filing in 1996, those developments have not altered the fundamental assumption underlying the Act – namely, that the Bell Operating Companies ("BOCs") would not voluntarily open their markets to competitors. With its ultimate goal the opening of the local exchange market, Congress dangled in front of the BOCs a "carrot" -- the opportunity to enter in-region long-distance markets. But Congress knew that this incentive was not sufficient to achieve such an ambitious undertaking. It needed the full involvement of the states, especially the unique expertise of state regulators and their local authority over the BOCs, to wield the "stick" of mandatory compliance with federal and local competition laws. Section 271 of the Act expressly requires the active and, in some cases, exclusive authority of the states in ensuring that the terms, conditions and pricing structures

necessary for network sharing are available and are just and reasonable. State laws enacted for this purpose are therefore an integral part of this regulatory scheme.

The Illinois General Assembly's view of the role of state regulators in opening the local market explicitly recognizes this delegation of authority. In recent amendments to Illinois' Universal Telephone Service Protection Law of 1985, the legislature found that "...the federal Telecommunications Act of 1996 established the goal of opening all telecommunications service markets to competition and accords to the states the responsibility to establish and enforce policies necessary to attain that goal..." 220 ILCS 5/13-102 (2000), *amended by* P.A. 90-185, § 10, eff. July 23, 1997. The role of state agencies in implementing and enforcing the ground rules for local competition is therefore well-established at both the state and federal levels.

Ameritech Illinois holds a different view. The company maintains that whether or not it is in compliance with state laws governing local competition is irrelevant to its request that federal regulators authorize its participation in Illinois' long-distance market. The Attorney General, as the chief law enforcement officer of the state, cannot agree with Ameritech Illinois. The laws enacted by the state's elected officials with respect to the establishment of a competitive telecommunications market are not mere policy pronouncements but represent the will of the people, acting to further the goals of the Act. It is impossible to review Ameritech Illinois section 271 "checklist" compliance without reviewing all that the state commission requires to "establish and enforce policies necessary" to implement federal law. The Attorney General will not endorse the notion that compliance with state law is immaterial to the Commission's consultation with the FCC and therefore does not warrant the Commission's attention.

Under the Attorney General Act, the Attorney General has the responsibility to protect the

rights and interests of the public in the operation of telecommunications service "both during and after the transition to a competitive market." 15 ILCS 205/6.5 Congress intended that the Commission's orders, rules and regulations be an integral part of this transitional regulatory scheme and the Attorney General consequently regards issues of state law compliance a necessary component of these proceedings. Until the Commission is satisfied that Ameritech Illinois recognizes and complies with the substantive requirements of the State's market-opening laws, the Commission should decline to recommend that the Federal Communications Commission approve Ameritech Illinois' section 271 application.

A. Legal Framework

The Telecommunications Act of 1996 ("TA 96") "established a pro-competitive, de-regulatory national policy framework that sought to eliminate the barriers that competitive local exchange carriers, known as CLECs, faced in offering local telephone service." AT&T Corp. v. FCC, 220 F.3d 607, 611 (D.C.Cir. 2000)(internal quotation marks omitted). Pursuant to section 271 of the Act, 47 U.S.C. 271, "Congress required the BOCs [Bell Operating Companies] to open their local markets to competition before allowing them to enter the long distance services market in-region, because, due to the unique infrastructure controlled by the BOCs, they could exercise monopoly power." Bell South Corp. v. FCC, 162 F.3d 678, 689-90 (D.C.Cir. 1998).

The history of AI as a BOC, and its 100 year monopoly over local service in much of Illinois, is necessary background to understand the intent and purposes of section 271. AT&T witness Joseph Gillan discussed the history and significance of AI's market dominance as follows:

> It is important to keep firmly in mind that the existing exchange network is the cumulative product of more than 100 years of investment, during most of which the incumbent was protected from competition through government edict. Moreover, for the past half-

> century, the local network was deliberately subsidized, with the intended purpose of establishing a geographic reach far greater than might result from standard commercial incentives.
>
> Ameritech Illinois' network is a unique legacy of historical circumstance - no other provider will ever enjoy the same conditions, protections and stable revenues that Ameritech Illinois enjoyed to create this resource ...
>
> By requiring that the network be *shared* with other competitors (through network elements at cost-based rates), the scale and scope economies of the inherited network become a public good, available to entrant and Ameritech alike. If these advantages remained exclusively with Ameritech Illinois, they would present a potentially insurmountable *barrier* to competition; by becoming a shared resource, however, these same scale and scope economies can become the *enabler* of local competition. In effect, the Act seeks to eliminate the incumbent's 100-year head start by restarting the contest with all competitors on an equal footing (at least with respect to the network itself).

AT&T Ex. 2.0 at 9 (emphasis in original).

TA 96 "proceeds on the understanding that incumbent monopolists and contending competitors are unequal." Verizon Communications, Inc. v FCC, 535 U.S. ___, 122 S.Ct. 1646, 1684 (2002). As Mr. Gillan pointed out: "[t]he core problem here is that the same party that today enjoys exclusive access to this incredibly valuable resource is simultaneously responsible for offering equal access to new competitors." AT&T Ex. 2.0 at 10. See also SBC v. FCC, 138 F.3d 410, 412 (D.C.Cir. 1998). The BOCs face conflicting incentives and obligations. They control and profit from the local network, yet are obligated under TA 96 to open it to competitors who would reduce its revenues by serving retail customers. See Verizon Communications Inc. v. FCC, 535 U.S. at ___, 122 S.Ct. at 1660 (quoting Sen. Beaux, H.R. Conf. Rep. No. 104-230, p. 113 (1996).

In response to these conflicting interests, Section 271 offers BOCs like AI a "deal": they can enter the potentially lucrative in-region long distance market in return for providing other

carriers access and interconnection to their networks. As the Court of Appeals for the D.C. Circuit stated: "To encourage BOCs to open their markets to competition as quickly as possible, the Act permits them to provide 'in-region' long distance service ... if they demonstrate that they have opened their local markets in that state to competition by fulfilling the requirements of section 271." AT&T v. FCC, 220 F.3d at 612. Congress intended entry into the in-region long distance market to act as an "incentive or reward" for opening the local market to competition. In the Matter of the Application of Ameritech-Michigan, 12 FCC Rcd 20543, para. 388 (1997).

The Illinois Commerce Commission ("Commission") initiated this docket upon AI's declaration that it would seek permission from the Federal Communications Commission ("FCC") to enter the long distance market in Illinois. ICC Docket 01-0662, Initiating Order at 3 (Oct. 24, 2001). The Commission stated that this docket will "enable the Commission to properly discharge its role as consultant to the FCC on matters related to Ameritech Illinois' compliance with section 271 of the 1996 Act." Id. at 5. AI, Staff, and various other parties intervened and more than 50 witnesses offered testimony addressing AI's compliance with section 271. An auditor, hired by the Commission, has been reviewing and testing AI's Operations Support Services ("OSS"), and its results will be the subject of a second phase of this proceeding. Initiating Order at 3. The development of a performance measurement and remedy plan was also deferred to a later phase[1].

The Commission's review of the evidence in this case should be based on the recognition

[1] Although a performance measurement and remedy plan was offered by AI witness James D. Ehr, AI Ex. 6.0, 6.1, 6.2 (not offered into record), AI was granted leave to withdraw its testimony on that plan, and has refiled testimony on this issue. Coincidentally, on July 10, 2002, the Commission approved a performance measurement and remedy plan in ICC Docket 01-0120. Proceedings addressing these issues are being scheduled as "Phase IB" of this docket.

that BOC entry into the in-region long distance market was intended to provide an incentive to open local markets to competition, and that Section 271 approval is an important "carrot" that Congress created to complement the "stick" of market-opening regulatory orders and enforcement. The FCC therefore expects a BOC like AI to have "fully implemented the competitive checklist" prior to section 271 approval. In the Matter of Verizon New Jersey, 2002 WL 1363263, Appendix C at para. 3, 5 (FCC, 2002).

B. Section 271 Requires State Commissions To Determine Whether AI Satisfies Track A or Track B and the Competitive Checklist.

Although the FCC will ultimately determine whether AI should be allowed to offer in-region long distance, it is given only 90 days from the date of the BOC's request to make that determination. 47 U.S.C. 271(d)(1) and (3). Given this abbreviated opportunity to evaluate BOCs' applications, section 271 delegates certain responsibilities to state regulatory commissions and to the United States Attorney General.

Congress directed the FCC to "consult" with the state commissions "in order to verify the compliance of the Bell operating company with the requirements of subsection (c)." 47 U.S.C. 271(d)(2)(B). Subsection (c) of section 271 contains the definition of "Track A" and "Track B" service as well as the "competitive checklist," consisting of 14 market-opening requirements. 47 U.S.C. 271(c) (1) and (c)(2)(B). These requirements encompass the principle that the BOCs are required to "offer CLECs access to their local telephone networks in three ways: by selling local telephone services to competitors at wholesale rates for resale to end users; by leasing network elements to competitors on an unbundled basis; and by interconnecting a requesting competitor's

network with their own. ... Through any of these three routes, CLECs may offer local phone service in competition with BOCs." AT&T v. FCC, 220 F.3d at 611.

The FCC recognizes that state commissions may have more time to review checklist compliance and are more in touch with local conditions. Accordingly, the FCC relies on its consultation with state commissions to make its final determination. The extent of this reliance depends upon the depth of analysis undertaken by the state commission prior to consultation, especially its reasoning and findings of fact. For example, in its Texas decision, the FCC said:

> We accord the Texas Commission's verification of SWBT's compliance substantial weight based on the totality of its efforts and the extent of its expertise on section 271 issues. Like the New York Commission, whose section 271 verification we also accorded substantial weight, the Texas Commission directed a lengthy, rigorous and open collaborative process with active participation by Commission staff and competitive LECs. [FN27] ... In addition, the Texas Commission has taken the lead on a number of emerging technical and legal issues related to provisioning of xDSL-capable loops. We thus place substantial weight on the Texas Commission's comments in this matter, as they reflect its role not only as a driving force behind these proceedings, but also as an active participant in bringing competition for local telecommunications services to Texas.

In the Matter of SWBT (Texas), 15 FCC Rcd 18,354, Para. 11 (2000). Although the FCC is not bound by state commission determinations, it will "carefully consider state determinations of fact that are supported by a detailed and extensive record." In the Matter of Verizon New Jersey, 2002 WL 1363263, Appendix C, para. 2 (FCC, 2002). If a commission fails to provide the basis or reasoning in support of its decision, the FCC is justified in disregarding its conclusion. See SBC v. FCC, 138 F.3d 410 (D.C.Cir. 1998) (FCC rejected Oklahoma state commission's conclusion that SBC Oklahoma satisfied the requirements of Track A because a carrier serving 20 business lines and 4 residential lines to employees did not represent an "actual commercial alternative" to the incumbent).

II. TRACK A COMPLIANCE

As a precondition to seeking permission to enter the Illinois long distance market, AI must show that it meets either the "Track A" or the "Track B" requirements of section 271(c)(1). AI offered evidence that it has entered into agreements with one or more unaffiliated competing providers of telephone exchange service to residential and business subscribers which specify the terms and conditions under which AI is providing access and interconnection to its network facilities. 47 U.S.C. 271(c)(1)(A) ["Track A"]. AI Ex. 14 at 3 (Heritage Rebuttal). Staff witness Qin Lui does not dispute that AI has met the requirements of Track A. Staff Ex. 10.0 at 22 and Staff Ex. 24 at 1; See also Staff Ex. 1.0 at 16 (Hoagg).

Once AI has shown that it has satisfied the requirements of Track A, the remaining questions are whether AI has fully complied with the checklist items, and whether AI's entry into the long distance market in Illinois furthers the goal of increased competition in the telecommunications market and is therefore in the public interest. SBC v. FCC, 138 F.3d at 413.

III. CHECKLIST COMPLIANCE

The People will not address every checklist item. Some of the checklist items are not in dispute, while others are the subject of extensive testimony and argument. The People's silence on any particular checklist item should not be construed as either agreement that the checklist item has been satisfied or that it has not been satisfied.

A. Checklist Item (i) - Interconnection, 47 U.S.C. 271(c)(2)(B)(i)

1. Checklist Item (i) Incorporates the Interconnection Duty under

Sections 251 and 252 of TA 96 and Includes Offering Interconnection at Just and Reasonable Rates, Terms and Conditions as Established by a State Commission.

The checklist items all provide that "[a]ccess or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each" of the following 14 checklist items. 47 U.S.C. 271(c)(2)(B). Checklist item (i) requires AI to offer interconnection "[i]n accordance with the requirements of sections 251(c)(2) and 252(d)(1)." Id. at 271(c)(2)(B)(i). The two sections incorporated into checklist item (i) establish the duty to allow interconnection and contain the major elements of the BOC's interconnection obligation.

Section 251(c)(2), incorporated into checklist item (i), establishes the BOC's duty to provide interconnection:

> (A) for the transmission and routing of telephone exchange service and exchange access;
>
> (B) at any technically feasible point within the carrier's network;
>
> (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
>
> (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

47 U.S.C. 251(c)(2).

The second section incorporated into checklist item (i), section 252(d)(1), delegates to state commissions the authority to establish prices for interconnection (and network elements) based on certain pricing principles. Section 252(d)(1) provides:

> (d) Pricing Standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section –

(A) shall be –

(1) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(2) nondiscriminatory, and

(B) may include a reasonable profit.

47 U.S.C. 252(d)(1). Section 252(c)(2) provides that for arbitrated agreements, the state commission shall establish rates according to subsection (d), just quoted above. The method devised by the FCC for setting rates under this section is referred to as the TELRIC model, and its validity was upheld by the United States Supreme Court in Verizon Communications, Inc. v. FCC, 535 U.S. __, 122 S.Ct. 1646 (May 13, 2002).

Checklist item (i) therefore includes a comprehensive assessment of AI's specific responsibilities to provide interconnection in light of the standards used by state commissions to set TELRIC-compliant prices. The importance of properly set rates was underscored by the Supreme Court in Verizon Communications Inc. v. FCC when it stated: "[W]holesale markets for companies engaged in resale, leasing, or interconnection of facilities cannot be created without addressing rates." 122 S.Ct. at 1662.

The particular obligations incorporated into checklist item (i) demonstrate that Congress intended that incumbent local exchange carriers like AI offer interconnection "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory" in accordance with

interconnection agreements and in accordance with state laws and regulations. Moreover, section 251(d)(3) specifically recognizes that state commissions will continue to have authority to set just, reasonable and nondiscriminatory rates, terms and conditions and "establish[] access and interconnection obligations of local exchange carriers" that are consistent with the obligation to interconnect.[2] The interconnection obligation imposed by section 251(c)(2), and incorporated into checklist item (i), therefore includes AI's obligation to conform with the entirety of section 251, including section 251(d)(3) and the resulting state commission rules and orders.

Section 252(d)(1) similarly demonstrates a Congressional intent that state commissions be responsible for establishing just and reasonable rates, terms and conditions for interconnection (and network elements). By incorporating this subpart, Congress made it clear that it expected BOCs to comply with state pricing rules, regulations and orders before the BOC can qualify for in-region long distance. Although section 252 agreements are negotiated by the parties, and only subject to arbitration by the state commission upon petition, section 252(d) obligates the state commissions to establish just and reasonable rates for interconnection outside the context of an interconnection agreement. Clearly Congress expected that state commissions would have the responsibility to set just and reasonable rates, terms and conditions for interconnection, subject only to the FCC's establishment of general pricing principles AT&T v. Iowa Utilities Board, 525

---

[2] Section 251(d)(3), Implementation, provides:

(3) Preservation of State access regulations. In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that –

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of this requirements of this section and the purposes of this part [47 U.S.C. sections 251 et seq.].

U.S. 366, 384 (1999).

The Illinois Commission, like commissions all over the country, has conducted extensive proceedings to determine interconnection rates, terms and conditions consistent with TELRIC and as required by sections 251 and 252. See, e.g., Staff Ex. 2.0 at 4-5 (identifying six Commission dockets); World Com Ex. 6.0 at 9-13 (discussing ICC TELRIC pricing dockets). TA 96 established a structure which relied extensively on coordinated and consistent state and federal regulatory action. For example, state commissions are obligated to arbitrate interconnection agreements, subject to federal policies and federal judicial review, but may establish and enforce "other requirements of State law in its review of an agreement." 47 U.S.C. 252(e)(3). See also id. at 252(e)(5)(if state fails to carry out its duties consistent with federal law, FCC has authority to preempt state action within 90 days); id., at 252(e)(6)(state commission action subject to review in federal district court).

To satisfy checklist item (i), AI must show that it complies with state law concerning just and reasonable rates, terms and conditions for interconnection, for the states have been the primary venue for establishing the substance of these terms. In Illinois, this includes complying with the requirements of section 13-801 of the Public Utilities Act. 220 ILCS 5/13-801. The General Assembly intended Section 13-801 to be consistent with TA 96, and set out specific interconnection terms and conditions to promote the same goals found in TA 96. Id. at 13-801(b).

Checklist item (i) requires more than a mere assessment of technical details: it requires this Commission to determine no less than whether AI is offering interconnection as Congress intended. Because the FCC requires that a BOC "fully implement" each checklist item, failure to

satisfy any of the interconnection obligations incorporated into checklist item (i), including state obligations incorporated into the relevant subparts of sections 251 and 252, presents an obstacle to Section 271 approval.

2. The Commission Should Require That AI Demonstrate That it Complies with Commission Rules, Regulations and Orders as Part of its Review of Whether AI Complies with Checklist Item (i).

TA 96 relies extensively on state commissions to monitor interconnection agreements and to establish standards and rates for interconnection. See, e.g., 47 U.S.C. 251, 47 U.S.C. 252, AT&T v. Iowa Utilities Board, 525 U.S. 366 (1999). In that role, the Commission has determined many aspects of AI's interconnection obligation in both arbitration dockets and more general dockets. See, e.g., Staff Ex. 4.0 at 32-33 (ICC Dockets 99-0615, 01-0623), at 4 (99-0615), at 7 (99-0615), at 9 (01-0614); World Com Ex. 6.0 at 8-13 (TELRIC Order), at 19-20 (00-0393); World Com Ex. 6.1 at 6-9 (99-0593); AT&T Ex. 3.0 at 13 (00-0393). Many of the issues raised in recent or pending ICC dockets were the subject of testimony and dispute in this docket, and it is far from clear whether AI has met its burden of proving that it complies with the interconnection obligations as they were established by this Commission. The People expect the Staff and CLEC parties to address whether there has been actual compliance with Commission orders in their Initial Briefs.

AI witnesses have maintained that state law, rules, regulations and orders are not relevant to the Commission's review of AI's compliance with the section 271 checklist. For example, AI witness Rhonda Johnson maintains that the "focus of this proceeding should be on Ameritech Illinois' compliance with Section 271 requirements, as those requirements have been defined by Congress in Section 271 and implemented by the FCC in over a dozen Section 271 orders." AI

Ex. 15.1 at 3. She later boldly asserts that "Track A criteria and checklist compliance are not based on state law." Id. at 5. The key issue before the Commission, therefore, is whether state requirements are incorporated into the checklist items. The People have demonstrated, as a matter of law, that they are. See supra at pages 9-12. The Commission should reject AI's position and find that unless AI complies with state law and Commission rules, regulations and orders regarding interconnection, it cannot find that AI has satisfied checklist item (i).

B. Checklist item (ii) - Access to network elements, 47 U.S.C. 271(c)(2)(B)(ii)

1. Checklist Item (ii) Requires AI to Provide Nondiscriminatory Access to UNEs under Sections 251 and 252 of TA 96 and Includes Offering UNEs at Just and Reasonable Rates, Terms and Conditions as Established by a State Commission.

Checklist item (ii) requires AI to provide or generally offer "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)" of TA 96. 47 U.S.C. 271(c)(2)(B)(ii). Like checklist item (i), this item incorporates section 251(c)(3), which establishes the duty to offer unbundled access to network elements (unbundled network elements, or "UNEs"), and section 252(d)(1), which authorizes state commissions to set just and reasonable rates, terms and conditions for UNEs.

Section 251(c)(3), incorporated into checklist item (ii), establishes the BOC's

> duty to provide to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable, and nondiscriminatory *in accordance with* the terms and conditions of the agreement and *the requirements of this section and section 252.* An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

47 U.S.C. 251(c)(3)(emphasis added). This section is substantially similar to section 251(c)(2), incorporated into checklist item (i), except that it addresses UNEs rather than interconnection.

The second section incorporated into checklist item (ii) is section 252(d)(1) of TA 96. 47 U.S.C. 252(d)(1). This is the same section that is part of checklist item (i), and establishes that state commissions are to establish prices for network elements based on certain pricing principles[3]. Like checklist item (i), checklist item (ii) requires a comprehensive assessment of how AI offers access to UNEs and whether its UNE rates comply with TELRIC pricing principles.

The particular obligations section 271 incorporates into checklist item (ii) demonstrate that Congress requires incumbent local exchange carriers like AI to offer UNEs "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory" in accordance with interconnection agreements and in accordance with state laws and regulations. Section 251(c)(3) requires that rates, terms and conditions for unbundled access be "just, reasonable and nondiscriminatory." 47 U.S.C. 251(c)(3). Section 251(d)(3) specifically recognizes that state commissions will continue to have authority to "establish[] access and interconnection obligations of local exchange carriers" that are consistent with the obligations under section 251(c)(3) to offer access to UNEs.[4] In the absence of an allegation that state action is inconsistent with TA 96, the access to UNE obligation imposed by section 251(c)(3), and incorporated into checklist item (ii), includes AI's obligation to conform with state law and Commission orders setting just, reasonable and nondiscriminatory rates, terms and conditions for such access.

This Commission, like commissions all over the country, has conducted extensive

---

[3] See page 10 above for text.

[4] Section 252(d)(1) is quoted in full at page 10 above.

proceedings to determine UNE rates, terms and conditions consistent with TELRIC and as required by sections 251 and 252. See page 13 above. Therefore, to satisfy checklist item (ii), AI must show that it complies with state law and Commission orders concerning just and reasonable rates, terms and conditions for access to UNEs. This includes complying with the requirements of section 13-801 of the Public Utilities Act, which specifically addresses network elements at subsection (d). 220 ILCS 5/13-801(d).

2. The Commission Should Require That AI Demonstrate That it Complies with Commission Rules, Regulations and Orders as Part of its Review of Whether AI Complies with Checklist Item (ii).

As in the case of interconnection, TA 96 relies extensively on state commissions to set UNE prices, to monitor agreements, and to establish just and reasonable rates, terms and conditions for the provision of UNEs. Many of the issues raised in recent or pending dockets were the subject of testimony and dispute in this proceeding, and it is far from clear whether AI has met its burden of proving that it complies with the obligations to provide UNEs established by the Commission. These are factual issues that the People expect the Staff and CLEC parties to address in their Initial Briefs.

AI witnesses have questioned the relevance of state law, rules, regulations and orders to the Commission's review of AI's compliance with checklist item (ii) on the same terms that are discussed above in connection with checklist item (i) and that discussion will not be repeated here. See supra, pages 9-14. Again, the key issue before the Commission is whether state requirements are incorporated into checklist item (ii). The People have demonstrated as a matter of law that they are. See id. The Commission should conclude that unless AI complies with state law and Commission rules, regulations and orders regarding access to UNEs, it cannot find that

AI has satisfied checklist item (ii).

C. Checklist Item (iii) - Pole Attachments, 47 U.S.C. 271(c)(2)(B)(iii) Checklist Item (iii) Similarly Incorporates State Requirements.

Checklist item (iii) requires BOCs to provide or generally offer "nondiscriminatory access to pole, ducts, conduits, and rights-of-way owned or controlled" by BOCs "at just and reasonable rates in accordance with the requirements of section 224." 47 U.S.C. 271(c)(2)(B)(iii). This checklist item is similar to checklist items (i) and (ii) in that it incorporates the provisions of another section of federal law, which contains the substantive procedures and requirements. It incorporates section 224 (47 U.S.C. 224), which provides in relevant part:

> C) State regulatory authority over rates, terms, and conditions, preemption; certification; circumstances constituting State regulation
> (1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights of way as provided in subsection (f) of this section, for pole attachments in any case where such matters are regulated by a State.
> (2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that –
> (A) it regulates such rates, terms, and conditions, and'
> (B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments as well as the interests of the consumers of the utility services.

47 U.S.C. 224(c). Section 224, like the other sections discussed above, recognizes that state commissions can have a role in regulating the rates, terms and conditions for pole attachments. 47 U.S.C. 224 (c). Therefore, to the extent that there are any issues regarding AI's compliance with checklist item (iii), this Commission's requirements as well as federal requirements should be considered.

AI witness Marcia Stanek and Staff witnesses Russell Murray and Mark Hanson addressed

this checklist item. Mr. Murray reserved his opinion on whether AI satisfies this item pending review of the performance data to be submitted in a later phase of this docket. Staff Ex. 7.0 at 4-5. Mr. Hanson addressed rate issues. He found that AI's rates conform with the Commission's order in ICC Docket 98-0397. Staff Ex. 5.0 at 13. AI witness Stanek agreed that AI has filed a tariffed rate based on the Commission's Order in ICC Docket 98-0397, apparently recognizing the Commission's authority to set "rates and conditions for poles, occupancy of ducts and conduit space and access to rights-of-way." AI Ex. 11.0 at 3.

AI and Staff agree that AI complies with the Commission's order regarding rates and conditions for pole attachments, ducts, conduits and rights of way. The same bases for applying state commission orders for this checklist item apply to other checklist items.

D. Checklist item (xiii), Reciprocal compensation, 47 U.S.C. 271(c)(2)(B)(xiii) The Reciprocal Compensation Requirements Implicate State Commission Action.

Checklist item (xiii) requires BOCs to provide or generally offer "[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)." 47 U.S.C. 271(c)(2)(B)(xiii). Like checklist items (i) and (ii), it incorporates the requirements of section 252 of TA 96. Section 252(d)(2) authorizes state commissions to set just and reasonable rates, terms and conditions for reciprocal compensation subject to certain federal requirements as follows:

(d) Pricing standards ...
(2) Charges for transport and termination of traffic
(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section

251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed--

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

47 U.S.C. 252(d)(2). Staff witness Jim Zolnierek testified that AI has not complied with this checklist item.

Mr. Zolnierek pointed out that the Commission set reciprocal compensation rates in an arbitration decision (ICC Docket 00-0027), and that under Illinois law, "ISP bound calls are local and should be due reciprocal compensation." Staff Ex. 3.0 at 38. Mr. Zolnierek testified that despite a Commission order approving certain TELRIC costs, AI has included different rates in its interconnection agreement offer to CLECs (the General Interconnection Agreement, or "GIA") that have not been reviewed by the Commission, appear to be based on a different cost model, and have not been found to be TELRIC compliant. Id. at 93; Staff Ex. 3.0 at 38.

Mr. Zolnierek agrees that the FCC, in its ISP-Bound Traffic Order authorized BOCs to

adopt a different rate structure for reciprocal compensation, including rate caps for all traffic. Staff Ex. 3.0 at 37 Further, if AI opts for the FCC reciprocal compensation rate caps, Mr. Zolnierek agrees that its rates would be governed by federal law. Id. However, to date, AI has not opted for the FCC rate caps, leaving the rates both subject to Commission oversight, and subject to the opt-in provisions of federal law. Id. and Staff Ex. 20.0 at 92.

AI's witness Scott Alexander appears to both agree and disagree with Mr. Zolnierek. Although he agrees that the FCC ISP-Bound Traffic Order only exempts ISP traffic from section 251(b)(5) obligations, and that the rate cap (if adopted) applies to all traffic (ISP and local), he maintains that AI has no obligation under section 251(b)(5) to treat any traffic as solely local or as subject to state reciprocal compensation rates. AI Ex. 1.1 Rev. at 41, 47. Mr. Alexander believes that reciprocal compensation arrangements are not subject to the opt-in provisions of section 252(i), meaning that AI can offer different rates to different carriers. Id. at 42. AI maintains that state reciprocal compensation rates are not relevant to checklist compliance because the FCC does not require that wholesale offerings be tariffed. Id. at 47.

Checklist item (xiii) specifically requires that BOCs seeking to enter the long distance market have reciprocal compensation arrangements in place. 47 U.S.C. 271(c)(2)(B)(xiii). AI argues that this Commission need not review its reciprocal compensation arrangements and that they are not subject to state law. AI Ex. 1.1 at 47. This presents a question of law that the Commission must resolve. Clearly Congress intended that reciprocal compensation arrangements be subject to oversight. The FCC's ISP-Bound Traffic Order offered BOCs an alternative reciprocal compensation arrangement, i.e. rate caps, if they choose to treat all traffic, ISP-bound and local, the same. Staff Ex. 3.0 at 35. However, AI argues that even in the absence of

choosing rate caps, all traffic should be treated as ISP-bound and not local. This would effectively remove the checklist item (xiii) requirement from Section 271. This is contrary to the plain language of checklist item (xiii), 47 U.S.C. 271(c)(2)(B)(xiii) and inconsistent with Congressional intent. Because AI has not opted for the rate caps, the default assumption should be that state rules apply -- not that no rules apply.

AI has not shown that it has approved reciprocal compensation arrangements in place in accordance with section 252(d)(2), and accordingly should be found to have not satisfied checklist item (xiii).

E. Checklist item (xiv) - Resale, 47 U.S.C. 271(c)(2)(B)(xiv) AI's DSL Resale Policies Conflict with the Commission's Resale Order and Are Anti-competitive.

Checklist item (xiv) provides that "[t]elecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3). Like checklist items (i), (ii), (iii), and (xiii) discussed above, checklist item (xiv) expressly incorporates other sections of TA 96 to state the substance of the checklist item (xiv) requirements. Specifically, it incorporates sections 251(c)(4) and 252(d)(3), which establish the resale duty and the bases for resale prices, respectively. 47 U.S.C. 251(c)(4) and 47 U.S.C. 252(d)(3). Section 251(c)(4)(A) and (B) provide, in relevant part, that the BOC has the duty "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications services." Section 252(d)(3) directs state commissions to determine wholesale rates, based on certain

criteria[5]

This Commission established a formula for determining wholesale rates, as required by section 252(d)(3) in ICC Docket 95-0458/95-0531. Staff Ex. 5.0 at 14. That Order established a formula to be used to discount retail rates to wholesale levels. AI has not applied this discount to its DSL offerings. Staff Ex. 24.0 at 47. Further, AI's witness John Habeeb argues that AI need not offer DSL for resale because it does not offer DSL to retail subscribers. Its subsidiary, AADS, offers DSL to the public. AI Ex. 13.1 at 3; Staff Ex. 10.0 at 26 (public and proprietary).

The availability and penetration of broadband Internet access has been a subject of extensive public interest in Illinois. When the General Assembly adopted House Bill 2900 one year ago, it included sections specifically requiring the dissemination of broadband technology, which includes DSL. For example, it established the Digital Divide Elimination Infrastructure Fund, 30 ILCS 105/5.545, and the Digital Divide Elimination Fund, 30 ILCS 780/5-20 and expanded the Community Technology Grant Program. 30 ILCS 780/5-30. It also ordered payment of $30 million into each of the first two funds above, 220 ILCS 5/13-502.5(e), and amended the Public Utilities Act to require that "every incumbent local exchange carrier ... shall offer or provide advanced telecommunications services to not less than 80% of its customers by January 1, 2005." 220 ILCS 5/13-517. An ILEC can seek a waiver from this requirement only

---

[5] Section 252(d)(3) provides:

(d) Pricing standards

... (3) Wholesale prices for telecommunications services

For purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

47 U.S.C. 252(d)(3).

upon a specified showing. See id. at 13-517(b). Clearly, the Illinois General Assembly considers the provision of advanced telecommunications services, such as DSL, to be a retail service that should be generally available from the incumbent telephone company.

AI has described its strategy of selling DSL through a subsidiary, AADS (Ameritech Advanced Data Services), at a rate that is not derived from the resale formula established by the Commission pursuant to section 252(d)(3). AI Ex. 13.0 at 16. However, in Association of Communications Enterprises v. FCC, 235 F.3d 662 (D.C.Cir. 2001)("ASCENT v. FCC"), the United States Court of Appeals squarely held that SBC/Ameritech could not escape the resale obligations in section 251(c)(4) by offering advanced services through an affiliate. The court said: "Since Congress prescribed no such affiliate structure for advanced services, we must assume that Congress did not intend for section 251(c)'s obligations to be avoided by the use of such an affiliate." 235 F.3d at 668. The court rejected the arguments in support of relieving SBC/Ameritech of its resale obligations as follows:

> In short, the Act's structure renders implausible the notion that a wholly owned affiliate providing telecommunications services with equipment originally owned by its ILEC parent, to customers previously served by its ILEC parent, marketed under the name of its ILEC parent, should be presumed to be exempted from the duties of that ILEC parent.

Id. at 668. The Court's decision leaves no doubt that the existence of a separate affiliate is irrelevant to SBC/Ameritech's resale obligations.

AI's failure to provide DSL for resale on the same terms as other retail services is a violation of the Commission's order setting the retail/wholesale price formula, and is an attempt to circumvent sections 251(c)(4) and 252(d)(3) in a way that the United States Court of Appeals has already rejected as unlawful and contrary to Congressional intent. The fact that broadband

deployment is a matter of public concern, as evidenced by the General Assembly's actions described above, makes AI's efforts to avoid its DSL resale obligations an issue that the People will address in connection with the public interest requirement of section 271. But regardless of whether the public interest is implicated, AI's failure to offer DSL for resale in accordance with the Commission's resale order and formula shows that is has not satisfied checklist item (xiv).

F. AI Has Not Fully Complied with All Checklist Items, and Accordingly Has Not Satisfied the Section 271 Requirements Necessary to Enter the In-region Long Distance Market.

The FCC has made it clear that in order for a BOC to enter the in-region long distance market, it must fully implement all of the checklist items. The purpose of section 271 is not to add another competitor to the long distance market, but to insure that the local market, which is controlled by the ILEC because "the local loop is a natural monopoly,"[6] is open so that competitors can serve local telephone consumers. See, e.g., AT&T v. FCC, 220 F.3d at 611. The fourteen checklist items, in addition to being technical requirements, represent the factors that Congress found necessary preconditions to local markets becoming competitive.

AI witnesses have testified that they do not believe that state and Commission requirements are relevant to checklist compliance. However, as demonstrated above, the checklist items and the general statutory and regulatory scheme established by Congress and the FCC are expressly dependent upon state commission action and oversight. The major role played by the states in establishing just and reasonable rates, terms and conditions for interconnection and access, including unbundled rates, reciprocal compensation and resale, is incorporated into

---

[6] ASCENT v. FCC, supra, 235 F.3d at 663.

checklist requirements by the express reference to sections 251 and 252 of TA 96. See 47 U.S.C. 271(c)(2)(B)(i), (ii), (iii), (xi), (xii), (xiii), (xiv). This is why Congress directed the FCC to "consult" with the state commissions when confronted with a section 271 petition. The state commissions are the agencies with direct, day-to-day experience with ILEC compliance with market opening requirements and are expected to have the best direct knowledge of current conditions.

In reviewing AI's checklist compliance, the Commission should hold AI to the standard set out by Congress and by the FCC. The checklist items are to be "fully implemented" so that markets are open. All avenues of entry are to be available, as demonstrated by checklist compliance. Further, rates must be lawful under the FCC's TELRIC principles and the section 252(d)(3) resale guidelines.

The evidence shows that AI has not complied with all of its obligations under the checklist, and that a positive recommendation from this Commission is not possible until the Commission is satisfied that its orders, as well as AI's federal obligations, are satisfied.

IV. The Commission Should Consider Whether AI's Entry Into In-Region Long Distance Is in the Public Interest Because the FCC Has Relied On State Commission Recommendations Concerning the Public Interest.

It is well established that compliance with the checklist items alone is insufficient to entitle a BOC to in-region long distance authority, and that the BOC must demonstrate that its entry is in the public interest independent of its checklist compliance. 47 U.S.C. 271(d)(3)(C); SBC v. FCC, 138 F.3d 410, 413, Fn. 5 (D.C.Cir. 1998). In general, the term "public interest" in a statute takes its meaning from the purposes of the Act of which it is a part. NAACP v. FPC, 425 U.S. 662,

669-670 (1976) (Power and Gas Acts' purpose to encourage orderly development of plentiful supplies of electricity and natural gas at just and reasonable rates. Employment practices outside scope of public interest.). The purpose of Section 271 and TA 96 generally is to stimulate competition in the local telecommunications market. Sprint v. FCC, 274 F.3d 549, 555-556 (D.C. Cir. 2001)(allegations of price squeeze in local market implicated public interest and required remand).

The public interest analysis is separate and distinct from checklist compliance. In the Matter of Ameritech Michigan, 12 FCC Rcd 20543 (1997), the FCC discussed the public interest requirement as follows:

> In making our public interest assessment, we cannot conclude that compliance with the checklist alone is sufficient to open a BOC's local telecommunications markets to competition. If we were to adopt such a conclusion, BOC entry into the in-region interLATA services market would always be consistent with the public interest requirement whenever a BOC has implemented the competitive checklist. Such an approach would effectively read the public interest requirement out of the statute, contrary to the plain language of the section 271, basic principles of statutory construction, and sound public policy.... Congress did not believe that compliance with the checklist alone would be sufficient to justify approval under section 271.

Id. at para. 389. The FCC described the public interest as encompassing:

> The overriding goals ... to open all telecommunications markets to competition by removing operational, economic, and legal barriers to entry, and, ultimately, to replace governmental regulation of telecommunications markets with the discipline of the market. In order to promote competition in the local exchange and exchange access markets in all states, Congress required incumbent LECs, including BOCs, to provide access to their networks in a manner that allows new entrants to enter local telecommunications markets through a variety of methods.

In the Matter of Ameritech Michigan, 12 FCC Rcd 20,543 at para. 386. A BOC is not entitled to offer in-region long distance services "until the [FCC] is satisfied on the basis of an adequate factual record that the BOC has undertaken all actions necessary to assure that its local

telecommunications market is, and will remain, open to competition." In the Matter of Ameritech Michigan, 12 FCC Rcd 20,543 at para. 386.

In discussing the scope of the public interest inquiry and the BOC's obligation to open its network, the FCC identified the following five factors as relevant to the public interest inquiry in the Michigan Order (12 FCC Rcd 20,543):

> (1) Are the various methods of entry contemplated by TA 96 "truly available"? Para. 387, 392.
>
> (2) Has the BOC agreed to a performance monitoring and remedy plan? Para. 393-394.
>
> (3) Does the BOC provide new entrants with optional payments plans for non-recurring charges, to avoid a single up-front payment? Para. 395.
>
> (4) Are there state or local laws that constitute barriers to entry? Para. 396.
>
> (5) Has the BOC "engaged in discriminatory or other anticompetitive conduct, or failed to comply with state and federal telecommunications regulations?" Para. 397.

The state commissions, being most familiar with local conditions, have advised the FCC on matters generally related to the public interest. One of the major public interest issues that state commissions have addressed is whether a BOC will continue to provide adequate wholesale performance, once the incentive of in-region long distance is gone. States have adopted performance remedy plans to insure that the BOCs do not "back-slide" or renege on its wholesale service obligations, and these plans are considered part of the "public interest" requirement that the BOC must satisfy in order to satisfy section 271. See, e.g., In the Matter of Verizon New Jersey, 2002 WL 1363263 at para. 176 (FCC); See, e.g., In the Matter of Bell Atlantic (New York), 15 FCC Rcd. 3953, para. 422-45 (1999); In the Matter of Verizon Pennsylvania, 16 FCC Rcd. 17,419, para. 70-71 (2001); In the Matter of Verizon Massachusetts, 16 FCC Rcd. 8988, para.

232-49 (2001); In the Matter of Verizon Rhode Island, 17 FCC Rcd. 3300, para. 102-10 (2002). The FCC has held that "states may create plans that ultimately vary in their strengths and weaknesses as tools for post-271 authority monitoring and enforcement." In the Matter of Verizon New Jersey, 2002 WL 1363263 at para. 177 (FCC). Clearly, the FCC has relied on state commissions to address public interest issues as well as section 271(c) issues.

State commissions have addressed more than performance assurance plans in the context of the public interest. Many commissions have also included analyses and recommendations about whether Section 271 approval would generally serve the public interest. The Texas Public Utility Commission, for example, outlined fifteen public interest conditions that it concluded had to be met before the Texas PUC could give a positive recommendation in response to Southwestern Bell Telephone Company's (SWBT) Section 271 application. These recommendations included the "ease of doing business with SWBT," and contained items beyond the performance assurance and monitoring plans that are now staples in state commission consultations to the FCC. Commission Recommendation, Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market, Project #16251 (June 1, 1998), available at http://www.puc.state.tx.us/telecomm/projects/16251/ 16251arc/16251de4.doc. Therefore, in addition to establishing performance monitoring for the future, state commissions such as the Texas PUC also made broader findings about the need for the BOC to act in a manner that would not harm the public interest of furthering competition.

The New Jersey Board of Public Utilities, for example, thoroughly considered the general public interest when making its 271 recommendations to the FCC. Consultative Report of the New Jersey Board of Utilities, In the Matter of the Consultative Report of the Application of

Verizon New Jersey, Inc. for FCC Authorization to Provide In-Region, InterLATA Service in New Jersey, FCC Docket No. TO0190541, CC Docket No. 01-347 (January 14, 2002), *available at* http://www.bpu.state.nj.us/wwwroot/telco/consultativereport.pdf. Verizon New Jersey argued that under TA 96, state commissions were only charged with verifying checklist compliance and that the New Jersey Board did not need to undertake a public interest analysis because this was delegated to the FCC and not to the state commissions. Other parties argued, however, that the public interest test was fully independent of the checklist items and that the FCC had "specifically requested that state commissions identify any factor they deem relevant to the public interest determination." Id. at 84. Specifically, AT&T argued that "in addition to its responsibilities pursuant to Section 271, the Board [had] an ongoing responsibility to protect the public interest." Id. at 85. Ultimately, the New Jersey Board found that a review of the public interest was indeed appropriate.

In recommending section 271 approval for Verizon New Jersey, the New Jersey Board considered whether any real or perceived barriers to market entry existed and concluded that the various decisions and orders that it had outlined in its order were sufficient to remove barriers. The New Jersey Board carefully considered whether the public interest would be served given the state of competition, whether the market was irreversibly open to competition, and adopted a performance assurance plan as well.

The Texas PUC made extensive, preliminary recommendations concerning the public interest aspect of SWBT's application for Section 271 before giving its final positive recommendation. "SWBT needs to show this Commission and the participants during the collaborative process by its actions that its corporate attitude has changed and that it has begun to

treat CLECs like its customers," stated Recommendation 2. Commission Recommendation, Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market, Project #16251 (June 1, 1998), available at http://www.puc.state.tx.us/telecomm/projects/16251/ 16251arc/16251de4.doc. Recommendation 6 also clearly stated that "SWBT needs to commit to resolving problems with CLECs in a manner that will give CLECs a meaningful opportunity to compete." Id. at 3. The Texas PUC carefully considered the overall aspect of the public interest in its recommendations to the FCC, and did not make a positive recommendation until all of its public interest concerns were resolved.

In addition to New Jersey and Texas, other state commissions, such as those in Rhode Island and Massachusetts, have also addressed the broader public interest in recommending section 271 approval. Both Rhode Island and Massachusetts had distinct sections in their commission recommendations to the FCC that discussed the state of the local exchange market and whether the ILEC's entry into the long-distance market would benefit consumers in that state. Rhode Island separately considered the state of competition in the local exchange market and concluded that the good faith Verizon Rhode Island had shown through its business dealings with its major competitors had benefitted the residential and commercial customers of Rhode Island. Report of the Rhode Island Public Utilities Commission on Verizon Rhode Island's Compliance with Section 271 of the Telecommunications Act of 1996, In the Matter of Application of Verizon New England, Inc., Bell Atlantic Communications, Inc. d/b/a Verizon Rhode Island NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. (collectively Verizon) Pursuant to Section 271 of the Telecommunications Act of 1996 To provide

In-Region, InterLATA Services in the State of Rhode Island and Providence Plantations, FCC Docket No. 01-324 at 190 (December 14, 2001), *available at* http://www.ripuc.org/news/VRI271_%20FinalReport16815.pdf.

The Massachusetts Department of Telecommunications and Energy also considered the public interest separate from the checklist items. It concluded that its efforts to expedite dispute resolution among carriers "will give CLECs the assurance that should Verizon Massachusetts act in an anti-competitive manner, CLECs will have a forum in which to gain swift recourse." Evaluation of the Massachusetts Department of Telecommunications and Energy, In the Matter of Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), and Verizon Global Networks Inc., For Authorization Under Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Massachusetts, FCC Docket No. 00-176 at 410-411 (October 16, 2000), *available at* http://www.state.ma.us/dpu/telecom/99-271/DTE_VZ271_Eval.PDF.

As these states exemplify, state commissions may and often do advise the FCC on the broader public interest aspects of section 271 approval in addition to and apart from the performance assurance plans for future compliance.

Clearly, state commissions are free to offer "consultation" to the FCC on a wide range of public interest issues which relate to whether the local market is open to competition, as required for Section 271 approval. However, AI witness Rhonda Johnson has suggested that the only two public interest issues the Commission may address are "whether there are state-specific market structure conditions that would preclude a finding that the marketplace is open; and two, whether

there is a sufficient remedy plan in place to protect against 'backsliding' by the Section 271 applicant." AI Ex. 15.0 at 11. This view is inconsistent with what other states have done and unreasonably limits the Commission from addressing issues that the FCC has identified as relevant to the public interest. Given the Illinois Commission's intimate involvement in the development of laws, rules and orders to promote competition, and its lengthy experience with AI's participation in the process, it would be wilful blindness for the Commission to not comment on the public interest areas identified by the FCC in the Michigan Order. See page 27 above. The Illinois Commission and the parties to this proceeding have extensive experience and knowledge about AI and the public interest issues, and the FCC and the public would benefit from Commission comment on these issues.

In Phase 1A of this proceeding, issues 1 and 5 above (whether the various methods of entry contemplated by TA 96 are "truly available" and whether the BOC "has engaged in discriminatory or other anticompetitive conduct, or failed to comply with state and federal telecommunications regulations") have been raised by Staff and intervening CLECs, and AI has responded with evidence and argument. Given the FCC's recognition of state commissions' expert knowledge and familiarity with local conditions, and its willingness to consider state input on public interest issues, Commission analysis of these issues would be consistent with the process established by Congress, and would further Congress' goal of insuring that markets are irretrievably open to competition before BOCs are permitted to offer in-region long distance service.

One public interest question, whether there is an adequate performance and remedy plan to prevent backsliding, has been deferred to a later phase of this proceeding. However, question 1 - are all methods of entry "truly available" and question 5 - has AI engaged in anticompetitive

conduct or failed to comply with state and federal telecommunications regulations, represent matters that have been addressed in the record and that require Commission comment.

A. The Evidence Shows That the Various Market Entry Paths Are Not "Truly Available" For Local Competition.

The effective implementation of section 271 is premised on having various avenues of local competition "truly available" to competitors. AT&T v. FCC, 220 F.3d at 611; In the Matter of Ameritech Michigan, 12 FCC Rcd 20543, para 387, 392. These include resale, unbundled UNEs, and interconnection. Id. Concerns have been raised by various parties about AI's provision of service for these avenues of competition. The Commission cannot find that AI's application conforms to the Act's and the FCC's public interest requirement to promote competition unless it finds that each of these avenues for competitive entry is free and clear. The evidence discussed below calls into question whether competition based on resale, UNEs and UNE-P, and interconnection are each "truly available" under AI's current practices.

In connection with market entry through resale, Staff witness Qin Lui testified that AI is not offering DSL according to the appropriate, Commission approved resale rate. Staff Ex. 24 at 48. She also discussed AI's refusal to implement "line splitting" so that competitive carriers can offer voice service to customers who use the high frequency portion of their line for DSL. Id. at 52. These policies unnecessarily limit CLECs ability to offer local voice and data service, and raises questions about whether the market for DSL is truly open and available to CLECs through resale.

AT&T witness Eva Fettig also addressed DSL and the availability of loops once AI deploys

Project Pronto on a large scale. She testified that AT&T may be prevented from reselling AI's loops which are upgraded as part of Project Pronto because AI claims that it need not unbundle those loops because of their advanced capabilities. AT&T Ex. 5.0 at 7-8. If AI's position is carried out, it will obstruct CLECs' ability to purchase unbundled loops, competitive DSL provisioning would be unavailable, and consumers of the State would have few if any choices for DSL service. Given the public interest in broad dissemination of broadband services, see page 22 above, the Commission should insist that AI make DSL available on both a resale and an unbundled basis. See Staff Ex. 24.0 at 45, 49; AT&T Ex. 5.0 at 7.

World Com witness Joan Campion and AT&T witness James Henson identified the difficulty in entering the market through UNEs and UNE-P when the prices for network elements are either undetermined or subject to repeated revision. World Com Ex. 6.0 at 13; AT&T Ex. 3.0 at 7-13. World Com witness Joan Campion pointed out that AI has changed the cost studies on which these TELRIC rates are based, shortly after an extended Commission review (non-recurring rate subject to revised cost study shortly after conclusion of 4 year long analysis of TELRIC cost studies). World Com Ex. 6.0 at 13-14; AT&T Ex. 3.0 at 7. Ms. Campion suggests that "Ameritech has done everything in its power to cast doubt on the TELRIC rates that it is relying upon in this proceeding to show how the local market in Illinois is irreversibly open to competition." Id.

The Commission cannot find that all avenues to market entry are "truly available" so long as the obstacles and uncertainties identified by Staff and CLEC witnesses remain. Many of the problems identified in this docket, including those referred to above, are related to AI's lack of compliance with state law and commission mandates and orders which are intended to make the

various avenues to competition in the local telephone market "truly available." The certainty that the CLECs seek would exist if AI's response to Commission orders was prompt and predictable. Instead, these witnesses complained that dockets are delayed and tariffs are often non-compliant, with multiple cost studies raising the specter of rate changes on the horizon.

B. The Commission Should Consider Whether AI's Compliance with Its Market Opening Orders Has Been Sufficient to Create the Market Certainty Necessary for Local Markets to Develop and Thrive.

The FCC has identified failure to comply with state and federal market-opening telecommunications laws and regulations as a concern in assessing whether a BOC should be allowed to enter the long distance market. TA 96 and section 271 in particular, are based on the public interest and express Congressional goal to open local telephone markets to competition. See Sprint v. FCC, 274 F.3d at 556. Therefore, the public interest under section 271 requires that AI's entry into in-region long distance not impede the development and spread of local telephone competition.

The Illinois Commerce Commission has a long history of market opening initiatives. Before TA 96, the Commission considered Ameritech's Customers First proposal, and it has continued its pro-competition policy in dockets opened to establish UNE and interconnection rates, terms and conditions in conjunction with TA 96. Staff Ex. 2.0 at 4-5. Despite these efforts, or possibly because of them, the Commission has been confronted with repeated requests for rehearings, appeals and non-compliant tariffs and rates. E.g., Id.; Staff Ex. 6.0 at 30-33, 44; World Com Ex. 6.0 at 8-13 (history of TELRIC order (ICC Docket 96-0486/96-0569)); AT&T Ex. 3.0 at 11-12 (table of pending market-opening dockets).

The Courts and the FCC agree that section 271 was intended to create an incentive to the

BOCs to open their local markets to competition in exchange for allowing the BOCs into the in-region long distance market. See AT&T v. FCC, 220 F.3d at 612; In the Matter of Ameritech Michigan, 12 FCC Rcd 20543, para. 388 (1997). In the absence of this incentive, and in the absence of a BOC's demonstrated commitment to market opening requirements, state commissions, CLECs and the public are left to coercive enforcement mechanisms to insure that the local market is opened to competitors and remains open.

The evidence in this docket demonstrates that AI has a history of resistance to market opening orders, which includes multiple appeals, applications for rehearing, revised cost studies, non-compliant tariffs, and withholding investment due to disagreements with market opening requirements (see ICC Docket 00-0393, AT&T Ex. 5.0 at 8). The level of AI's resistance indicates a refusal to adopt market opening principles and values as its own, and calls into question whether it would be in the public interest to allow AI to benefit from in-region long distance entry while it continues to show resistance to local market opening orders and requirements. Congress intended long distance entry to be an incentive to open local markets to competition. Without that impetus, AI will have no motivation to promptly resolve outstanding disputes and make competitive entry truly available.

The Commission should not recommend that AI enter the in-region long distance market until pending dockets and Orders currently on appeal, petitions for rehearing, and compliance dockets are resolved. The uncertainty attendant to these matters undermines competitive entry, and the tools to compel compliance are greatly diminished once the lure of long distance entry is gone. It is not in the public interest to recommend AI for in-region long distance authority so long as so many basic pricing and regulatory issues remain outstanding.

V. CONCLUSION

WHEREFORE, for the above stated reasons, the People pray (1) that the Commission find that state law and Commission orders are integral parts of the Section 271 checklist analysis; (2) that if the Commission finds that all avenues to competitive entry are not "truly available", it conclude that recommending that AI receive authority to enter the in-region long distance market is not in the public interest; and (3) that the Commission delay making a recommendation on whether AI should receive authority to enter the in-region long distance market until the Commission's pending market opening orders are resolved and AI is found to have opened its local market to competition.

Respectfully submitted,
People of the State of Illinois
By JAMES E. RYAN
Attorney General

By: _____

Janice A. Dale
Assistant Attorney General
Chief Public Utilities Bureau
100 West Randolph Street, 11th Floor
Chicago, Illinois 60601
(312) 814-3736
Jdale@atg.state.il.us

By: _____

Susan L. Satter
Senior Assistant Attorney General
Public Utilities Bureau
100 West Randolph Street, 11th Floor
Chicago, Illinois 60601
(312) 814-1104
Ssatter@atg.state.il.us

July 24, 2002

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

ILLINOIS COMMERCE COMMISSION, on its own motion,	)	Docket No. 01-0662
Investigation concerning Illinois Bell Telephone Company's compliance with Section 271 of the Telecommunications Act of 1996	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that on this date, July 24, 2002, we filed with the Chief Clerk of the Illinois Commerce Commission 527 East Capitol Avenue, Springfield, Illinois 62794-9280 the enclosed Initial Brief of the People of the State of Illinois by e-docket.

_____
Susan L. Satter
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Susan L. Satter, Assistant Attorney General, hereby certify that I served the above identified document upon all parties of record on the attached service list on July 24, 2002, by electronic mail. Hard copies will be provided upon request.

_____
Susan L. Satter
Assistant Attorney General

Susan L. Satter
Assistant Attorney General
100 West Randolph Street
11th Floor
Chicago, Illinois 60601
(312) 814-1104

SERVICE LIST
ICC Docket No. 01-0662

Eve Moran
Administrative Law Judge
Illinois Commerce Commission
160 North La Salle Street
C-800
Chicago, Illinois 60601-3104

Mary C. Albert
Vice President
Allegiance Telecom, of Illinois, Inc.
1919 M Street NW
Suite 420
Washington, DC 20036

Penny Bewick
Director
Government Affairs
3000 Columbia House Boulevard
Suite 106
Vancouver, WA 98668

Sean R. Brady
Office of General Counsel
Illinois Commerce Commission
160 North La Salle Street
Suite C-800
Chicago, Illinois 60601-3104

Eric J. Branfman
Swidler, Berlin, Shereff &Friedman, LLP
3000 K Street NW
Suite 300
Washington, DC 20007-5116

Nada Carrigan
AT&T

913 South Sixth Street
3rd Floor
Springfield, Illinois 62703

Cecely Castillo
Assistant State's Attorney
Cook County State's Attorney's Office
69 West Washington Street
Suite 700
Chicago, Illinois 60602

Robin F. Cohn
Attorney
Swidler, Berlin, Shereff and Friedman, LLP
3000 K Street NW
Suite 300
Washington, DC 20007-5116

Tamara E. Connor
Attorney
Kelley Drye & Warren, LLP
8000 Towers Crescent Drive
Suite 1200
Vienna, VA 22182

J. Tyson Covey
Attorney
Mayer, Brown & Platt
190 South La Salle Street
Chicago, Illinois 60603-3441

Janice A. Dale
Assistant Attorney General
Illinois Attorney General
100 West Randolph Street
11th Floor
Chicago, Illinois 60601

Matt C. Deering
Attorney
Meyer Capel a Prof. Corp.
306 West Church Street

P. O. Box 6750
Champaign, Illinois 61826-6750

Michael P. Donahue
Attorney
Swidler, Berlin, Shereff, Friedman and LLP
3000 K Street, NW
Suite 300
Washington, DC 20007-5116

Joseph E. Donovan
Attorney
O'Keefe, Ashenden, Lyons & Ward
30 North La Salle Street
Suite C-8
Chicago, Illinois 60601-3104

Carmen Fosco
Office of General Counsel
Illinois Commerce Commission
160 North La Salle Street
C-800
Chicago, Illinois 60601-3104

Loretta J. Garcia
Attorney
Irwin, Campbell & Tannenwald, P.C.
1730 Rhode Island Avenue, NW
Washington, DC 20036

Hans Germann
Attorney
Mayer Brown Rowe & Maw
190 South La Salle Street
Chicago, Illinois 60603

Kara Gibney

Attorney
Mayer Brown Rowe & Maw
190 South La Salle Street
Chicago, Illinois 60603

Allan Goldenberg
Environment & Energy Division
Cook County State's Attorney's Office
69 West Washington Street
Suite 700
Chicago, Illinois 60602

John Gomoll
AT&T
222 West Adams Street
Floor 15
Chicago, Illinois 60606

Chris Graves
Administrative Law Judge's Assistant
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, Illinois 62701

William Haas
McLeodUSA Telecommunications Service
6400 C Street
P. O. Box 3177
Cedar Rapids, IA 52406-3177

Cheryl Hamill
Attorney
AT&T
222 West Adams Street
Suite 1500
Chicago, Illinois 60606

Matthew L. Harvey
Office of General Counsel
Illinois Commerce Commission
160 North La Salle Street
C-800
Chicago, Illinois 60601-3104

Michael B. Hazzard
Attorney
Kelley Drye & Warren, LLP
8000 Towers Crescent Drive
Suite 1200
Vienna, VA 22182

Peter R. Healy
Manager
525 Junction Road
Suite 6000
Madison, WI 53717

David A. Irwin
Attorney
1730 Rhode Island Avenue
Washington, DC 20036

Andrew O. Isar
Director
7901 Skanskie Avenue
Suite 240
Gig Harbor, WA 98335

Rhonda Johnson
Vice President
Illinois Bell Telephone Company
555 Cook Street
1E
Springfield, Illinois 62721

Henry T. Kelly
Joseph E. Donovan
O'Keefe, Ashenen, Lyons & Ward
30 North La Salle Street
Suite 4100
Chicago, Illinois 60602

John T. Lenahan
Illinois Bell Telephone Company
225 West Randolph
Floor 25C
Chicago, Illinois 60606

Theodore A. Livingston
Attorney
Mayer, Brown, Rowe & Maw
190 South La Salle Street
Chicago, Illinois 60603

Owen E. Mac Bride
Attorney
Schiff Hardin & Waite
6600 Sears Tower
Chicago, Illinois 60606

M. Gavin McCarty
333 West Wacker Drive
Suite 1500
Chicago, Illinois 60606

Demetrios G. Metropoulos
Attorney
Mayer, Brown, Rowe & Maw
190 South La Salle Street
Chicago, Illinois 60603

Stephen D. Minnis
Sprint Communications Company
8140 Ward Parkway
5E
Kansas City, MO64114

Stephen J. Moore
Attorney
77 West Wacker Drive
Suite 4600
Chicago, Illinois 60601

Dennis K. Muncy
Meyer, Capel A Prof.
306 West Church Street
P. O. Box 6750
Champaign, Illinois 61826-6750

Joseph Murphy
Attorney
Meyer, Capel A Prof.
306 West Church Street
P. O. Box 6750
Champaign, Illinois 61826-6750

Julie Musselman
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, Illinois 62701

Joy Nicado-Cuyugan
Case Manager
Illinois Commerce Commission
160 North La Salle Street
C-800
Chicago, Illinois 60601-3104

David Nixon
Office of General Counsel
Illinois Commerce Commission
160 North La Salle Street
C-800
Chicago, Illinois 60601-3104

Angela O'Brien
Attorney
Mayer, Brown, Rowe & Maw
190 South La Salle Street
Chicago, Illinois 60603

Mark Ortlieb
Ameritech
225 West Randolph
25th Floor
Chicago, Illinois 60606

Jack A. Pace
Assistant Corporation Counsel
City of Chicago
30 North La Salle Street
Suite 900
Chicago, Illinois 60602-2580

Daniel Parish
Attorney
Mayer, Brown, Rowe & Maw
190 South La Salle Street
Chicago, Illinois 60603

Mark N. Pera
Assistant State's Attorney
Cook County State's Attorney's Office
69 West Washington Street
Suite 700
Chicago, Illinois 60602

Patrick Phipps
Case Manager
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, Illinois 62701

Carol P. Pomponio
XO Illinois, Inc.
303 East Wacker
Chicago, Illinois 60601

Thomas Rowland
Attorney
Rowland & Moore
77 West Wacker Drive
Suite 4600
Chicago, Illinois 60601

Margaret D. Rubino
601 South Harbour Island Boulevard
Suite 220
Tampa, FL 33602

Susan Satter
Assistant Attorney General
Illinois Attorney General's Office
100 West Randolph Street
11th Floor
Chicago, Illinois 60601

Kenneth A. Schifman
Senior Attorney
8140 Ward Parkway
Kansas City, MO 64114

Marie Spicuzza
Assistant State's Attorney
Cook County State's Attorney's Office
69 West Washington Street
Suite 700
Chicago, Illinois 60602

Louise A. Sunderland
Illinois Bell Telephone Company
225 West Randolph Street
25D
Chicago, Illinois 60601

Darrell Townsley
Midwest Region Public Policy
205 North Michigan Avenue
Chicago, Illinois 60601

Ron Walters
601 South Harbour Island Boulevard
Tampa, FL 33602

Michael Ward
Attorney
Michael Ward, P.C.
1608 Barkley Boulevard
Buffalo Grove, Illinois 60089

Nancy Wells
AT&T
913 South Sixth Street
Floor 3
Springfield, Illinois 62703